

**Chapter 201: PROCEDURES FOR THE ABUSE OR NEGLECT SUBSTANTIATION
PROCESS, AND FOR APPEALS FOR PERSONS SUBSTANTIATED AS
PERPETRATORS OF ABUSE OR NEGLECT OF CHILDREN, AND APPEALS
FOR FROM DENIAL OF ACCESS TO CONFIDENTIAL RECORDS**

The Department of Health and Human Services adopts the following procedures to govern the substantiation process and to notify and provide an appeal to persons who have been substantiated by the Department of Health and Human Services as having abused or neglected a child or children and appeals from denials of access to confidential records.

I. LEGAL BASIS; SUCCESSOR STATUTES AND AGENCIES

The Department adopts these rules pursuant to 22 M.R.S.A. §42(1). These rules are necessary for the successful operation of the Child and Family Services and Child Protection Act, 22 M.R.S.A. §4001 *et seq.* Specifically, these rules are necessary to the Department's obligation to determine the degree of harm or threatened harm to each child in each case that comes to its attention, pursuant to 22 M.R.S.A. §4004(2)(C) and appeals from denial of access to confidential records under 22 M.R.S.A. §4008(7).

When any statute or agency is referred to in these rules, the rules shall also be construed to refer to any successor statute or agency. A "successor agency" is an agency that is given powers or responsibilities similar to the agency named in these rules, whether or not the agency named in these rules continues to exist or retain the powers or responsibilities.

II. RELATIONSHIP TO OTHER PROCEEDINGS**A. Pending matters**

1. If a person is or becomes a party (including as an intervenor) to any of the proceedings listed in paragraph 5, the appeal process in these rules shall be dismissed without prejudice. The order or notice dismissing the appeal process shall contain a statement that the person has 60 days after the conclusion of the proceeding, to request that the appeal process be reinstated, that the person may contact the Department or the Child Welfare Ombudsman for further information, that a favorable result in the other proceeding does not necessarily mean that the substantiation will be reversed, and that if the person is in doubt about the effect of the other proceeding, then the person should request a reinstatement of the proceeding pursuant to these rules. The notice shall give phone numbers for the person to contact the Department and the Child Welfare Ombudsman.
2. To preserve any right to a paper review or administrative hearing after the termination of the other proceeding, the person must file a request for a paper

review after receipt of the original notice, as provided in Section X, even if the person is a party to one of the proceedings listed in paragraph 5.

3. At the conclusion of the proceeding that caused the dismissal, the person will be entitled to have the appeal process reinstated, unless the Department is entitled to record and report the person as substantiated pursuant to paragraph B of this part.
4. In order to reinstate the process, the person must file a request for review as provided in Section X within 60 days of the conclusion of the other proceeding, unless a “good cause” exception has been granted by the Department.
5. The proceedings that result in dismissal of the appeal process in these rules are the following:
 - a. Proceedings pursuant to Maine Revised Statutes, Title 22, chapter 1071 (child protective);
 - b. Any other civil proceeding in which there is a factual issue of whether or not the substantiated person subjected the child(ren) to abuse or neglect or of whether the substantiated person committed the conduct or omissions that created the circumstances of abuse or neglect;
 - c. Any proceeding similar to a and b above in another state or territory of the United States; or
 - d. Any criminal or juvenile proceeding in which the person is charged with conduct substantially similar to the conduct upon which the Department based its substantiation decision.
6. For purposes of this section, another proceeding “concludes” on the date following the last date on which any post-judgment motions may be filed pursuant to the Maine Rules of Civil Procedure or Maine Rules of Criminal Procedure, as the case may be, if no direct appeal is taken from the judgment. If a direct appeal is taken from the judgment, and if the judgment is affirmed on appeal, then the proceeding “concludes” on the date that the Law Court issues its mandate (usually two weeks after the decision is published). If a direct appeal is taken from the judgment, and the appeal results in the case being remanded to the trial court, then the proceeding “concludes” when the remand is resolved, namely on the date following the date that any post-judgment motions may be filed.

B. Determinations based on findings from other proceedings

1. If a court of competent jurisdiction specifically finds that a person has abused or neglected a child, or that a child is in circumstances of jeopardy with regard to the person, or a court of another state or United States territory makes a similar finding, the Department may record and report the person as substantiated for abuse or neglect of a child.
2. If an agency of another state (including political subdivisions of other states) determines that a person abused or neglected a child, or makes a similar finding, the Department may record and report the person as substantiated for abuse or

neglect of a child, if the person had the opportunity for an administrative hearing on the finding by the other state's agency.

3. If a person is convicted of a crime where the charges arose out of the same conduct or pattern of conduct as that upon which the Department based its substantiation, then the Department may record and report the person as substantiated for abuse or neglect of a child.
4. If a court of competent jurisdiction specifically finds that a person has not abused or neglected a child in a case to which the Department was a party, the Department must record and report that the specific allegation of abuse or neglect at issue in the court proceeding was unsubstantiated. A court finding that a child is not in circumstances of jeopardy is not, for purposes of this paragraph, a finding that a person has not abused or neglected a child. In order to require the Department to record and report allegations as unsubstantiated, the court must specifically find that the allegations are not supported by the evidence. The Department may reverse a substantiated or indicated determination on the basis of a court order in a case to which it was not a party.

C. Simultaneous administrative proceedings

If a substantiation decision forms a basis for the Department's action against any license or certificate that the substantiated person holds to operate a facility for children listed in Maine Revised Statutes, Title 22, sections 7801 or 8301-A, and if the substantiated person timely requests an administrative hearing on the Department's action, then the administrative hearing on the substantiation decision may, in the discretion of the Chief Administrative Hearings Officer, be consolidated with the hearing on the Department's action against the license or certificate to operate a facility for children.

III. PROCESS FOR SUBSTANTIATION DETERMINATIONS

A. Department policy to govern

Except as otherwise provided by statute or by these rules, the Department's policy governs receipt of reports of abuse or neglect, investigation of those reports, assessment of the circumstances of any child or substantiated person, and determination to substantiate, indicate or unsubstantiate a person.

In an administrative hearing decision, the hearing officer and Commissioner may take into account any improprieties of the Department's investigation or assessment to the extent that it causes any information that the Department obtained to be untrustworthy, but the failure of the Department to comply with its policies for investigation or assessment is not cause for reversing a substantiation.

B. Allowable determinations

After an investigation or assessment, the Department may make one or more of the following determinations with regard to a person:

1. Unsubstantiated

2. Indicated
3. Substantiated

More than one determination may be made. For example, the Department may determine that a person is “substantiated” for risk of physical abuse to a child but that a person is “unsubstantiated” for risk of sexual abuse to a child.

C. Further investigation or assessment

The closing of an investigation or assessment and making of a determination pursuant to paragraph B does not preclude the Department from further investigating or assessing the circumstances of the child, family or substantiated or indicated person. If the Department obtains new information relating to the original circumstances, or if there is a change in circumstances, the Department may make a new determination pursuant to paragraph B.

IV. “ABUSE OR NEGLECT”; DEFINITION; GUIDELINES; SPECIAL RULE REGARDING SEX OFFENDERS; SOURCES OF AUTHORITY

A. Definition

“Abuse or neglect” is defined in 22 M.R.S.A. §4002(1). That definition is, by design, broad. It is impossible to list all circumstances that may be “abuse or neglect.”

B. Guidelines

In making or reviewing a substantiation or indication determination, the following guidelines apply:

1. “Abuse or neglect” means any set of circumstances that
 - (a) is caused by a person responsible for the child or from which a person responsible for the child has failed to protect the child, and
 - (b) has caused or may in the future cause a child to suffer any of the following types of harm:
 - (i) Physical harm (that is, physical injury, physical illness, or any physical condition that is contrary to the child’s good health);
 - (ii) Mental, emotional or psychological harm or distress; or
 - (iii) Sexual abuse or exploitation.
2. There is “abuse or neglect” if there is any threat of harm; it is not necessary that the child have already suffered the harm.
3. It is not necessary that the person responsible for the child be at any legal or moral “fault,” or that the person have committed a crime.

4. A person responsible for a child subjects the child to “abuse or neglect” either by taking some act (or course of action) that causes the harm or threat of harm to the child, or by failing to take some act (or course of action) to protect the child from the harm or threat of harm.
5. “Abuse or neglect” does not include the threats of harm that occur regularly in everyday life, such as the risk of serious injury always inherent in riding in a car, as long as the person responsible for the child takes all reasonable and all legally-required precautions to reduce the threat of harm, such as using proper seat belts and child restraints. A precaution may be “reasonable” and therefore necessary to avoid “abuse or neglect” even though it is not legally-required.
6. Because the focus of the process is on the harm to the child and not blame of the person responsible for the child, any physical, cognitive or psychological limitations, or other special needs, of the person responsible for the child are not taken into account in determining whether the child is subject to “abuse or neglect” or what precautions are “reasonable” to protect a child from harm.
7. Any special needs of a child are to be taken into account in determining what is necessary to protect the child from harm. For example, a child who is prone to self-injurious behavior may require closer supervision than most children.
8. A person subjects a child to “abuse or neglect” when the person is the person responsible for the child who has either caused the threat of harm or has failed to protect the child from the threat of harm. There is no limit to the number of people who may subject the same child to the same abuse or neglect. For example, if a parent leaves the child with a person whom the parent knows is a convicted or adjudicated sex offender, then both the sex offender and the parent have subjected the child to abuse or neglect, and both may be indicated or substantiated.
9. Abuse or neglect may be a discrete event, a set of continuing circumstances, or a pattern of events or circumstances.
10. A person responsible for a child does not subject a child to “abuse or neglect” or fail to protect a child from “abuse or neglect” if the person acts reasonably and responsibly given the totality of the circumstances directly related to the discrete event, set of continuing circumstances, or pattern of events or circumstances that forms the basis of the indicated or substantiated decision.
11. A child shall not be considered to be abused or neglected, in jeopardy of health or welfare or in danger of serious harm solely because treatment is by spiritual means by an accredited practitioner of a recognized religious organization.

C. Special rule regarding sex offenders

A child is presumed to be subject to “abuse or neglect” when the parent or person responsible for the child intentionally, knowingly or recklessly allows, encourages or fails to prevent contact between the child and a person who:

1. Has been convicted of an offense listed in Title 19-A, section 1653, subsection 6-A, paragraph A in which the victim was a minor at the time of the offense and the person was at least 5 years older than the minor at the time of the offense except that, if the offense was gross sexual assault under Title 17-A, section 253, subsection 1, paragraph B or C and the minor victim submitted as a result of compulsion, the presumption applies regardless of the ages of the person and the minor victim at the time of the offense;
2. Has been adjudicated in an action under Title 22, chapter 1071 of sexually abusing a person who was a minor at the time of the abuse;
3. Has been substantiated or indicated as a result of sexual abuse or exploitation of a minor.

For purposes of this section, “intentionally,” “knowingly” and “recklessly” have the meanings given them by 17-A M.R.S.A. §35(1), 17-A M.R.S.A. §35(2), and 17-A M.R.S.A. §35(3)(A) & (B), respectively.

The parent or person responsible for the child may produce evidence to rebut the presumption.

This section shall not be construed to prevent a finding of abuse or neglect in other circumstances.

D. Sources of Authority

In determining or reviewing whether a child was subjected to “abuse or neglect,” a Department employee (including a hearing officer) shall consider as authority any and all of the following:

1. Any relevant state statute, which may include statutes in the Maine Juvenile Code (a portion of Title 15 of the Maine Revised Statutes), Title 19-A of the Maine Revised Statutes, Title 22 of the Maine Revised Statutes, and any other statute that may be relevant in the circumstances;
2. Any applicable Maine Supreme Judicial Court opinion that provides an interpretation of the meaning of “jeopardy,” except that the Court’s determination that a set of circumstances does not constitute “jeopardy” does not mean that the set of circumstances does not constitute “abuse or neglect”;
3. These rules;
4. The Department’s other promulgated rules; and
5. The Department’s unpromulgated policies, which shall be treated as persuasive, but not binding, authority.

In the case of inconsistencies among any of the authorities listed above, the authorities shall be given the same weight and deference that they are given in courts.

V. DEFINITIONS

Any terms defined or used in Maine Revised Statutes, Title 22, section 4002, have the same meaning when used in these rules, except to the extent modified in these rules.

For the purpose of these rules, the following terms have the following meanings:

- A. “Administrative hearing” means a hearing conducted in accordance with the Department of Health and Human Services Administrative Hearings Regulations and these rules, as such regulations and rules are amended from time to time.
- B. “Appeal” means the two-stage procedure described here. The first stage is a paper review. The second stage is an administrative hearing.
- C. “Appellant” means a substantiated or indicated person who has begun the process of appealing the substantiation determination.
- C-1. “Collateral consequences” means
 - 1. loss of employment, or denial of a good faith application for employment in a position for which the applicant was qualified;
 - 2. loss or denial of a license or benefits issued by any federal, state or municipal government;
 - 3. expulsion from or denial of admission to an educational program, or admission to an educational program where employers in that field are required to consult with the Department to determine whether employees have been substantiated for child abuse or neglect; or
 - 4. deprivation of a life, liberty or property interest that is protected by Due Process Clause of the Fourteenth Amendment to the United States Constitution or Article I, Section 6-A of the Maine Constitution.
- D. “Department” means the Maine Department of Health and Human Services
- E. “Good cause” means (1) failure of the appellant to actually receive notice of the substantiation, unless the appellant has moved and has not notified the Department of his or her new address after being informed of the obligation to do so, or (2) reasons beyond the control of the individual.
- F. “Hearing officer” means an administrative hearing officer who has received specialized training in child abuse and neglect.
- G. “Indicated” means an administrative determination made by the Department of Health and Human Services that an individual or legal entity was a person responsible for a child who was subject to “abuse or neglect,” that the abuse or neglect was of low to moderate severity, and that the individual or legal entity poses no threat of harm to children for whom the person might be responsible through employment or volunteer activities. (As provided in section XI.H., the hearing officer in an administrative hearing does not

determine whether abuse or neglect justifies a finding of “substantiated” or only “indicated,” but determines only whether there was abuse or neglect.)

- H. “Paper review” means a review by a reviewer of all relevant Department records and all relevant written information that the appellant submits.
- H-1. “Person responsible for the child” has the meaning given it in 22 M.R.S.A. §4002(9), with the following interpretation. A “person responsible for the child” is any person who has responsibility to supervise and protect a child from harm. Without limiting the generality of the definition or interpretation of the term, the following persons are deemed to be persons responsible for the child:
 - 1. A parent, whether or not the parent has custody or primary physical residence of the child;
 - 2. A step-parent, whether or not the parent to whom the step-parent is married has custody or primary physical residence of the child;
 - 3. An adult “family or household member” of the child or a parent, as that term is defined in 19-A M.R.S.A. §4002;
 - 4. Any person to whom a parent or other person responsible for a child expressly or impliedly gives temporary or permanent authority or responsibility for the care, supervision and control of the child, or the authority to discipline the child. This includes, but is not limited to,
 - a. an adult babysitter, whether or not related to the child, whether or not paid, and regardless of the length of time the person is responsible for the child;
 - b. a child care facility or a home day care; or
 - c. an educational facility.
- I. “Privileged records” means information in the Department’s records that the Department is not required to provide to an appellant because it is (a) information in the record that is confidential or privileged pursuant to State or Federal law; (b) information that the Department reasonably believes would increase the risk of harm to a child if provided to the appellant; or (c) information or documents created by the person conducting the Paper Review.
- J. **Receipt of Notice.** A person is deemed to have received a notice or mailing that the Department sends to the person on the earliest of the following dates:
 - 1. The date the person actually receives the notice or mailing, as evidenced by a signed return receipt for the mail;
 - 2. The date the person refuses delivery of certified mail, or the date that the United States Postal Service returns the certified mail as unclaimed, as evidenced by a notation by the United States Postal Service on or accompanying the mail; or

3. The date that is three (3) calendar days after the date the Department mails the notice or mailing by ordinary first-class mail to the person's last known address, if the United States Postal Service does not return the mail to the Department as undeliverable.
- K. "Relevant records" shall mean all records, relating to the substantiated person, from the file under which the substantiation decision is entered, and all exculpatory information known to the Department, whether or not that information is in the file under which the substantiation decision is entered. "Relevant Records" specifically does not include any documents created by the person conducting the Paper Review, nor the records of any communications between the person conducting the Paper Review and any other person. For purposes of this paragraph, the final decision by the reviewer on whether to uphold or overturn the substantiation decision is a "Relevant Record."
- L. "Reviewer" shall mean an employee of the Department who is specially trained to review indication and substantiation decisions and who has not had any association with or knowledge of the case prior to the indication or substantiation decision.
- L-1. "Substantiated" means an administrative determination made by the Department of Health and Human Services that an individual or legal entity was the person responsible for a child who was subject to "abuse or neglect" where either (1) the abuse or neglect was of high severity or (2) the individual or legal entity poses a threat of harm to children for whom the individual or legal entity may become responsible through employment or volunteer activities.
- M. "Substantiated person" means the individual(s) or legal entity(ies) whom the Department has determined was the person responsible for the child who was subject to "abuse or neglect." It does not include an "indicated" person.
- N. "Substantiation process" or "substantiation determination" means the process that the Department uses to determine whether a person should be substantiated, indicated or unsubstantiated for abuse or neglect of a child, or the result of that process, or both, as the context requires.
- O. "Unsubstantiated" means an administrative determination made by the Department of Health and Human Services that a child was not subject to "abuse or neglect."

VI. PUBLIC AVAILABILITY OF INFORMATION

The applicable law and regulations may be examined online at:
<http://www.maine.gov/sos/cec/rules/10/chaps10.htm> or requested from:

Office of Child and Family Services
Department of Health and Human Services
2 Anthony Avenue
Augusta, ME 04333
Phone: (207) 624-7900
FAX: (207) 287-6156
TTY: 711

VII. NOTIFICATION OF SUBSTANTIATED PERSONS

Within ten (10) business days of making a substantiation determination, the Department shall provide the affected person with written notice, readable at a sixth grade level, sent by ordinary first-class mail and by certified mail, addressee only, return receipt requested, to the affected person's last known address. If the affected person is not an individual, then the notice may be addressed to any office or place of operation of the substantiated entity or to any officer, director, trustee, member, manager, partner, clerk or other general agent of the substantiated entity. The notice shall include the following information:

- A. Whether the person has been substantiated, indicated or unsubstantiated for abuse or neglect of a child or children, and, if the person is indicated or substantiated, the specific factual findings and a summary of the evidence that is the basis for the findings.
- B. If the person is substantiated or indicated, that the names of substantiated and indicated persons are maintained by the Department, a description of the circumstances under which the substantiation or indication decision may be shared with persons outside of the Department, and if the person is substantiated, that the substantiated person may be at risk of collateral consequences.
- C. If the person is indicated or substantiated, that the person has a right to a review of the decision.
- D. That the first stage of an appeal is a paper review, and that neither the appellant nor the appellant's attorney or authorized representative is entitled to be present during the paper review, but that the appellant may provide written information in support of his or her paper review, including written statements by adults (written statements by children are prohibited); and that the appellant may be represented by an attorney in the appeal process.
- E. If the person is substantiated, that if the paper review upholds the substantiation decision, the appellant may request an administrative hearing at which he or she may be present to present evidence in support of his or her objections to the substantiation decision, may be represented by an attorney or other representative legally authorized to represent appellant, may call witnesses, and may cross-examine state witnesses. Further details about the administrative hearing are in section XI.

- F. If the person is substantiated, that a substantiated person who desires a review of the Department's substantiation must request an appeal in writing within thirty (30) calendar days of the time the substantiated person receives the Department's notice of its substantiation decision; that failure to timely appeal may result in the appellant's name forever remaining in the Department's records, including, but not limited to, the computerized database, and a waiver of the right to appeal; that the substantiation decision may be disclosed to employers in certain fields (such as child care or education); that the substantiation decision may affect the substantiated person's ability to obtain certain licenses (such as foster care licenses); that the substantiation decision may be used as evidence against the substantiated person in other legal proceedings; and
- G. If the person is substantiated, that the substantiated person may be eligible to receive legal assistance from Pine Tree Legal Assistance or other legal service agencies, along with the names, addresses and telephone numbers of other legal service agencies (including Pine Tree Legal Assistance) that have stated a willingness to assist appellants.

Where any term in paragraphs A through G above is defined in section V above, the notice to the substantiated person shall define the term in language suited for a person with a sixth-grade education.

The letter notifying the substantiated person of the substantiation shall comply with the requirements of Title VI of the Civil Rights Act of 1964, and with the Americans with Disabilities Act of 1990.

VIII. APPEALS

Substantiated and indicated persons shall have the following rights to review of a substantiation decision.

- A. A paper review shall be available to a substantiated or indicated person who submits a written request as required by these rules.
- B. An administrative hearing shall be available to a substantiated person whose substantiation decision was upheld after a paper review.

IX. TIME FOR APPEAL

- A. A substantiated or indicated person must appeal the decision within thirty (30) calendar days of the date the person receives the Department's notice. A substantiated or indicated person may appeal the determination more than thirty (30) days after receiving the Department's notice only if the person can show good cause for not appealing within thirty days, except that, even with good cause, an individual must always appeal within ninety days of the date the Department mails the notice to the individual.
- B. A substantiated or indicated person who fails to appeal within the time provided in this section forfeits all right and ability to appeal the decision forever.

- C. The time for requesting an administrative hearing after a paper review is covered in the procedures for requesting an administrative hearing, below.
- D. When this rule requires a request for appeal to be made within a specific amount of time, it means that the Department must receive the request within that amount of time, with an exception for documented good cause. The failure of the Department to receive, for any reason, a request for appeal that an appellant sends to the Department shall not extend the time for taking an appeal. If an appellant wishes to ensure that the request is timely received, the appellant may send the request by certified mail, return receipt requested, may deliver the request personally, or may send the request by any other method that ensures that the Department receives it timely.

X. PROCEDURES FOR PAPER REVIEW

The following procedures apply to a paper review of a substantiation or indication decision:

- A. An appellant shall appeal by sending a written request for a paper review to the following address:

Substantiation Reviews
Office of Child and Family Services
Department of Health and Human Services
11 State House Station
Augusta ME 04333-0011

The written request may be personally delivered, or sent by USPS, FedEx, UPS, or other delivery service, to the Department at 2 Anthony Avenue, Augusta, Maine 04333. In that case, the envelope containing the request should be addressed to Substantiation Reviews, Office of Child and Family Services.

The writing shall be taken as a written request for a paper review if it in any manner objects to the substantiation or indication decision or requests any type of review of the substantiation or indication decision.

- B. Within thirty (30) calendar days of its receipt of a request for a paper review from an appellant, the Department shall
 - 1. determine whether the appeal is timely pursuant to Section IX (either within the original time for appeal or within the extended time with good cause); and
 - 2. if the Department determines that the appeal is untimely, notify the appellant of that determination. If the Department determines that the appeal is untimely, the appellant may make a written request for a review by the Office of Administrative Hearings, addressed to the address in paragraph A, above. The appellant may send with the request for review any documentation in support of the appellant's position that the appeal was timely, and may send a written argument. The Office of Administrative Hearings shall review the Department's record and the materials submitted by the appellant, and shall determine whether the request is timely. If the Office of Administrative Hearings determines that the request is timely, then the paper review shall continue as provided in paragraph C

below, except that the appellant shall have thirty (30) calendar days from the date of the Office of Administrative Hearing's determination that the appeal was timely to submit the written information in support of his or her appeal.

- C. The appellant shall have thirty (30) calendar days from the date the Department receives the appellant's request for a paper review to submit to the Department written information in support of his or her appeal. The written information may include statements from other people or argument.
- D. If the request for a paper review is timely, the Department shall conduct the paper review within sixty (60) calendar days after the date it receives the request for a paper review.
- E. The reviewer shall make his or her decision based solely upon the Department's record and any additional information that the appellant submits. If the reviewer relies on information in the Department's record that the Department obtained after notifying the appellant of the indicated or substantiated decision, then the reviewer shall notify the appellant of the substance of the information and shall give the appellant at least 7 days in which to provide a written response before the reviewer makes a final decision. The reviewer shall determine by a preponderance of the evidence whether the information in the record, taken as a whole, is sufficient to support the allegation that abuse or neglect has occurred, that the appellant was responsible for the abuse or neglect and further, in cases of alleged neglect, that the appellant was a person legally responsible for the neglected child. The reviewer shall have the authority to overturn or sustain the prior decision to substantiate or indicate the appellant. If the reviewer overturns a decision to substantiate, the Department may record the result as "indicated" without the concurrence of the reviewer or the appellant.
- F. Within five (5) business days of completing the review, the reviewer shall notify the appellant, by U.S. first-class mail, of the decision.
 - 1. If a substantiation is upheld, the notice, readable at a sixth grade level, shall include the following information:
 - a. That the appellant is entitled to an administrative hearing by writing to the address noted above within thirty (30) calendar days of the time the appellant receives the notice of the result of the paper review. The notice shall explain that the administrative hearing will be conducted by a hearing officer of the Department; that the appellant will have the right to obtain a copy of all non-privileged relevant records prior to the hearing upon request pursuant to the Administrative Hearings regulations, with directions on how to obtain those records; and that the appellant will have the right at the hearing to provide written evidence provided that the appellant provides the written evidence to the Department's representative at least 10 days before the hearing, to present adult witnesses, to cross-examine the Department's witnesses, to speak directly to the hearing officer, and to be represented by a lawyer or other legally-authorized person of the appellant's choice.
 - b. That if an appellant does not request an appeal within thirty (30) calendar days, or within sixty (60) days if there is good cause, his or her name

shall remain in the computerized database and the right to appeal will have been waived.

- c. That the names of substantiated persons are maintained in a computerized database and that a substantiated person may be at risk of collateral consequences.
 - d. That the appellant may be eligible to receive legal assistance from Pine Tree Legal Assistance or other legal service agencies, along with the names, addresses and telephone numbers of any agency (including Pine Tree Legal Assistance) who have provided that information to the Department and who have certified to the Department that they can make licensed attorneys available to appellants in appeals of substantiation decisions.
 - e. Where any term in paragraphs a through d above is defined in section V, the notice to the appellant shall define the term in language suited for a person with a sixth-grade education.
2. If an indication is upheld, or if a substantiation is changed to an indication, the notice, readable at a sixth grade level, shall explain the meaning and consequences of the indicated decision.

The letter notifying the appellant of the result of the paper review shall comply with Title VI of the Civil Rights Act of 1964 and with the Americans with Disabilities Act of 1990.

XI. ADMINISTRATIVE HEARING PROCEDURES

Except as otherwise provided here, the administrative hearing shall be conducted pursuant to the procedures for Orders of Reference in the Department's Division of Administrative Hearings Regulations, as amended from time to time. The Order of Reference shall state as the issue for hearing, "Whether the Department was correct when it found that [name of appellant] subjected [name(s) of child(ren)] to abuse or neglect or failed to protect [name(s) of child(ren)] from abuse or neglect." The following rules apply to an administrative hearing of a decision to substantiate a person for child abuse and/or neglect:

- A. An appellant whose paper review affirms the substantiation decision shall be entitled to an administrative hearing. The appellant must request an administrative hearing in writing so that the Department receives his or her request within thirty (30) calendar days of the date the appellant receives the Department's notice of the results of the paper review, except that, upon a showing of good cause, the appellant may request an administrative hearing so that the Department receives the request within 60 days of the date it mailed the notice of the results of the paper review.
- B. If the appellant believes that the appellant has or is likely to suffer imminent collateral consequences as a result of the substantiation decision, and if the appellant wants the Chief Administrative Hearing Officer to prioritize the matter for hearing under paragraph F below, the appellant may submit with the request for hearing a statement describing the collateral consequences. The request and any statement describing

collateral consequences shall be in writing addressed to the same address as for requests for paper reviews.

- C. The Division of Administrative Hearings will schedule a hearing pursuant to its rules. If the bureau, division, or office that issued the substantiation decision believes that the request for hearing was not timely or that there is another reason why the appellant is not entitled to a hearing, it may request that the Chief Administrative Hearing Officer dismiss the matter or that a hearing not be held.
- D. Notwithstanding any provision of the Department's Administrative Hearing Regulations, the Department need not provide to the appellant any records that are privileged records (as that term is defined in these rules), except that the Department shall allow the Appellant to examine any records that it intends to introduce into evidence at the hearing.
- E. The administrative hearing shall be conducted by an independent hearing officer of the Department of Health and Human Services.
- F. If the Chief Administrative Hearing Officer determines that there are too many pending requests for administrative hearings for the Division of Administrative Hearings to handle all of them timely, then the Chief Administrative Hearing Officer may prioritize the pending cases for hearing. In determining the priority of cases, the Chief Administrative Hearing Officer shall give priority to any case in which the record and any statement of collateral consequences by the appellant shows that the appellant has or is likely to suffer imminent collateral consequences as a result of the substantiation decision.
- G. The Division of Administrative Hearings regulations shall govern the admission and exclusion of evidence at the administrative hearing, with the following exceptions:
 - 1. Departmental employees may submit their direct testimony in writing, as long as they do so at least ten (10) calendar days prior to the hearing, unless the parties agree to a shorter time. The Department shall send a copy of the prefiled testimony to the appellant at the same time that it submits it to the Office of Administrative Hearings. Employees who have pre-filed their direct testimony may only be compelled to attend the hearing for purposes of cross-examination. The hearing officer shall take into account the other responsibilities of the Department's caseworkers when scheduling the time and manner of their attendance. When necessary to accommodate their schedules, such employees may attend by video or telephone, if available. A caseworker or supervisor who has relevant information shall attend the hearing (in person, by video or by telephone) upon the request of the appellant made at least 10 days prior to the hearing.
 - 2. Oral or written evidence of statements of any child are admissible without the testimony of the child, except that statements written by a child, made for purposes of the appeal, are not admissible. The hearing officer may rely on a child's statement to the extent of its probative value. The hearing officer shall not draw any negative inference from a party's inability to cross-examine the child about the child's statements.
 - 3. Only adult witnesses shall testify at the hearing, except that if the appellant is a child, the appellant may testify. The hearing officer shall not take the testimony

of any child, except that the hearing officer may take the testimony of an appellant who is a child.

4. The provisions of Maine Revised Statutes, Title 22, section 4015, relating to the abrogation of privileges, apply to administrative hearings to the same extent that they apply to child protective proceedings.
5. If the appellant refuses or fails to execute releases of any confidential information, including but not limited to substance abuse treatment records, for use in the assessment, investigation or hearing, the hearing officer shall conclude that any findings made by the Department that could be supported by the confidential information are supported by the evidence, unless the hearing officer finds that the records are irrelevant to the issues on appeal. This paragraph applies only if the Department has provided the appellant with notice of the consequences of failure to execute releases.
6. The appellant shall provide to the Department representative handling the hearing, at least 72 hours before the hearing, or earlier pursuant to any order from the Office of Administrative Hearings, any documents or other exhibits that the appellant intends to introduce into evidence at the hearing. The rules of the Office of Administrative Hearings regarding the sanction applied to the Department for failure to provide records govern the sanction to be applied in the event that the appellant fails to comply with this paragraph.
7. The person who conducts the paper review of the substantiation determination may not testify at the hearing, and may not be called or subpoenaed by any party.
8.
 - a. Evidence discovered after the substantiation determination relating to events occurring or circumstances existing before or at the time of the substantiation determination, if otherwise admissible, shall be admitted as relevant to the issue of whether the child was abused or neglected at the time of the substantiation determination, provided the party intending to present the evidence has given notice of the evidence sufficiently prior to the hearing. This includes statements made by any person after the substantiation determination relating to events or circumstances before or at the time of the substantiation determination.
 - b. Evidence of events or circumstances that occur after the time of the substantiation determination shall not be admitted. This includes statements made by any person after the substantiation determination relating to events or circumstances that occurred after the time of the substantiation determination.
- H. At the hearing, the Department shall bear the burden of persuasion. The hearing officer shall determine by a preponderance of the evidence whether the evidence presented at the hearing, taken as a whole, is sufficient to support the allegation that the appellant had subjected the child to “abuse or neglect” as of the time of the substantiation determination. The hearing officer shall not determine whether the “abuse or neglect” is of high severity or whether the appellant poses a threat of harm to children for whom the person might be responsible through employment or volunteer activities. The hearing

officer's decision is limited to whether the appellant subjected the children to "abuse or neglect," and not whether the appellant should be "indicated" or "substantiated."

- I. The hearing officer shall make a recommendation to the Commissioner (pursuant to the Department's Administrative Hearings Regulations governing Orders of Reference) to take one of the following actions on the determination of "abuse or neglect":
 1. overturn it, in which case the bureau, division, or office that made the original determination may, at its discretion, without the concurrence of the appellant, hearing officer or Commissioner, record the person as either "indicated" or "unsubstantiated"; or
 2. sustain it.
- J. Notwithstanding the rules of the Office of Administrative Hearings, an appellant's representative must be an attorney or, to the extent that Maine law allows a non-attorney to represent a party at an administrative hearing, a person who would be eligible to receive information and records from the Department pursuant to 22 M.R.S.A. §4008. If the representative is a non-attorney employee of a legal services firm or agency, if the representation is permitted by law, then the representative must be supervised by an attorney, who must file with the Office of Administrative Hearings a letter or certification that the attorney is personally supervising the representative in the appeal.

The representative may not be a person who was involved in the circumstances that led to the substantiation determination. The representative may not testify at the hearing or be the author of any documentary evidence.

XII. RELEASE OF INFORMATION BY THE DEPARTMENT

- A. The Department will use reasonable efforts to respond to inquiries from persons who have reason to believe that they may be named as substantiated or indicated in child abuse or neglect case records. The Department shall develop an appropriate form for use by persons who wish to make such a request. The Department shall not use a person's request for any purpose other than to process that request. The Department may discontinue responding to these requests if it becomes unduly burdensome or if it interferes with the Department's responsibilities to provide reviews under these rules to persons who are substantiated after the effective date of these rules.
- B. If the Department releases any information regarding a substantiation to any person outside of the Department or the Office of the Attorney General, and excepting any information provided pursuant to a subpoena or court order, (1) while an appeal is pending under this rule; (2) before the expiration of the appeal period provided for in these rules; or (3) after an appeal has been dismissed without prejudice pursuant to Section II.A. and the other proceeding that caused the dismissal is still pending; then the Department shall include with the information provided a statement that the substantiation may be subject to administrative review by the Department at the appellant's request.
- C. If a person is indicated and not substantiated, the Department shall respond to any request for a check of child protective history relating to that person by stating that the person has

not been substantiated for abuse or neglect, and shall give no further information unless otherwise required by law.

- D. When the Department releases information without an authorization from a person who has been indicated and the person suffers collateral consequences as a direct result of the Department's release of the information, the person may request an administrative hearing if the person has obtained a paper review as permitted by these rules in Section VIII. A. This right does not exist if the Department was required by state or federal law to release records in a particular instance. The indicated person must follow the following process:
1. The indicated person may request an administrative hearing regarding the indicated decision within sixty (60) calendar days of the date the indicated person knows, or should have known, about the collateral consequences or risk of collateral consequences. An indicated person who fails to request the administrative hearing within the time provided in this paragraph forfeits all right and ability to appeal the indicated decision forever.
 2. The request for an administrative hearing must be in writing addressed to the address for all substantiation reviews. The appellant must send with the request for hearing sufficient documentary evidence that the appellant has suffered, or is at risk of suffering, collateral consequences, and that the Department has released, without the person's authorization, information about the indicated decision to a person other than persons involved in the assessment that resulted in the indicated decision.
 3. Section XI, paragraphs C through I of these rules applies to the administrative hearing, except that before scheduling the hearing, the Office of Administrative Hearings shall determine whether the appellant has made a sufficient showing that (1) the Department released, without the authorization of the person, the indicated finding to a person other than persons involved in the assessment that resulted in the indicated decision, and (2) the appellant has suffered, or is at risk of suffering, collateral consequences as a direct result of the Department's release of the information.

XIII. SUBSTANTIATED MINORS

Notwithstanding any other provision of these rules, a minor who has been substantiated for abuse or neglect of a child or children may pursue any procedure under these rules not previously pursued on his or her behalf any time before the minor reaches the age of 25.

XIV. EFFECTIVE DATES; SUBSTANTIATIONS MADE BEFORE FIRST EFFECTIVE DATE

- A. The procedures in these rules are available to persons whom the Department substantiates on or after the original effective date of these rules.

The procedures created by the 2008 amendments to this rule apply to all investigations, assessments and substantiation determinations, both those pending at the effective date of the amendments and those commenced on or after the effective date.

A case is not pending for the purposes of this rule if the Commissioner of the Department of Health and Human Services has issued a Final Decision prior to the effective date of the amendments.

- B. A person who was substantiated before November 1, 2003 may request a paper review and administrative hearing pursuant to these rules only as follows:
1. If the substantiated person received a notice of the substantiation determination when it occurred (or shortly thereafter), but was not notified of any opportunity to request a review of the substantiation, and if the substantiated person has suffered or is at risk of suffering collateral consequences, then the person may request a review pursuant to paragraph C below.
 2. If the substantiated person received notice of the substantiation determination when it occurred, requested and received a paper review, and has suffered or is at risk of suffering collateral consequences, then the person may request an administrative hearing pursuant to paragraph D below.
 3. If the substantiated person never received a notice of the substantiation, and if the substantiated person has suffered or is at risk of suffering collateral consequences, then the person may request a review pursuant to paragraph C below.
 4. If the substantiated person received a notice of the substantiation determination when it was made (or shortly thereafter), was notified of the opportunity to request a review of the substantiation, but failed to request a review, then the substantiated person is not entitled to any further review pursuant to these rules.
- C. The following procedures govern the review available to a person who never received the opportunity to have the substantiation determination reviewed:
1. The substantiated person must appeal the substantiation decision within sixty (60) calendar days of the date the substantiated person knows, or should have known, about the collateral consequences or risk of collateral consequences. A substantiated person who fails to appeal within the time provided in this paragraph forfeits all right and ability to appeal the substantiation decision forever.
 2. Section X of these rules applies to the paper review, with the following exceptions and additions:
 - a. The appellant must send with the request for review sufficient documentary evidence that the appellant has suffered or is at risk of suffering collateral consequences.
 - b. In addition to determining the timeliness of the appeal pursuant to section XIV.C.1., the Department shall determine whether the appellant has met the requirement for collateral consequences. A determination that the requirement for collateral consequences was not met may be reviewed in the same manner as a determination that the appeal was not timely.

3. An administrative hearing is available to the appellant after the paper review to the same extent as for any other paper review pursuant to these rules.
- D. The following procedures govern the administrative hearing available to a person who received a paper review but who did not have the opportunity for an administrative hearing:
1. The substantiated person must appeal the substantiation decision within sixty (60) calendar days of the date the substantiated person knows, or should have known, about the collateral consequences or risk of collateral consequences. A substantiated person who fails to appeal within the time provided in this paragraph forfeits all right and ability to appeal the substantiation decision forever.
 2. The request for an administrative hearing must be in writing addressed to the address for all substantiation reviews. The appellant must send with the request for hearing sufficient documentary evidence that the appellant has suffered or is at risk of suffering collateral consequences.
 3. Section XI, paragraphs C through I of these rules applies to the administrative hearing, except that before scheduling the hearing, the Office of Administrative Hearings shall determine whether the appellant has made a sufficient showing of collateral consequences.

XV. RECONSIDERATION OF SUBSTANTIATED FINDING

Subject to specific conditions that follow, an appellant may request reconsideration of a substantiation. The procedures and permitted outcomes are set forth below.

Note: This section does not apply to Out-of-Home Investigations. This section also does not apply to a substantiated finding that was upheld after an appeal to the Maine Superior Court or the Maine Law Court.

Reconsideration is available only if the substantiation satisfies one of the conditions in section A, and all of the conditions in section B, below:

A. Reconsideration is Available Only if the Appellant Proves One of the Following:

1. **Lack of Notice:** The substantiation was made after November 1, 2003 and the appellant proves that he or she did not receive notice of the substantiation
2. **Jeopardy Not Reached:** The substantiated finding was ineligible for appeal because of a proceeding in District Court and no finding of jeopardy was made prior to the court dismissing the case; or
3. **Risk Remediated:** After the substantiation, the appellant successfully engaged with prevention and intervention services, such that there was no filing of a petition for child protection order in court, and the Department closed its case because the appellant remediated the risks originally identified; or

4. **Substantial Change in Law or Policy:** After the substantiation there was a substantial change in an area of law or the Department's policy, and the substantiation would not have been made by the Department, had the assessment taken place under the current law or policy; or
 5. **Extraordinary Cases Post-Adoption:** The substantiation pertained to a child with special needs re-entering the Department's custody post-adoption, in order to ensure the safety of family members in the home.
- B. **In Addition, Reconsideration is Limited to Those Cases in Which All of the Following Conditions are Satisfied:**
1. **Collateral Consequences:** The appellant is experiencing collateral consequences as defined in these rules; and
 2. **Three Years Have Passed:** Reconsideration may be requested no sooner than three (3) years after the date of the appellant's receipt of notice of the substantiation.
- C. **Limit of One Opportunity:** An appellant shall have no more than one opportunity to obtain a review under this section for each substantiation finding. In cases with multiple substantiation findings the Department may, in its discretion, consolidate the review process for each substantiated finding.
- D. **Standard and Burden of Proof:** The appellant seeking reconsideration has the burden of proving the required facts by clear and convincing evidence.
- E. **Manner of Review:** Reconsideration shall consist of a paper review as defined in these rules. The decision of the reviewer is final. The appellant is not eligible for an administrative hearing if the substantiation is upheld at the paper review.
- F. **Permitted Outcomes:** If the appellant satisfies his or her burden of proof under this section, the Department shall make a new record of the matter as a reconsidered substantiation. The Department's record shall show one of the following:
1. The substantiation was reconsidered and overturned because the finding was made after November 1, 2003 and the appellant did not receive notice of the substantiated finding; or
 2. The substantiation was reconsidered and overturned because the appellant has made demonstrable changes so that he or she no longer poses a threat of abuse or neglect to any child; or
 3. The substantiation was reconsidered and overturned due to substantial change in law or the Department's policy, and the substantiated finding would not have been made had the assessment taken place under the current law or policy; or
 4. The substantiation was reconsidered and overturned due to a child with special needs re-entering the Department's custody post-adoption, in order to ensure the safety of family members in the home; and the appellant does not present a threat

of abuse or neglect to any child.

- G. **Child Protection History Checks:** When a substantiation finding was reconsidered and overturned, the Department will not disclose information about the substantiation (unless such disclosure is specifically requested for a purpose benefitting the appellant and the Department receives a release signed by the appellant).

XVI SUBSTANTIVE RULES FOR THE APPEAL FROM DENIAL OF ACCESS TO CONFIDENTIAL RECORDS

If a parent, guardian, or custodian of a child requests disclosure of information about the child contained in the Department's record under 22 M.R.S.A. § 4008(2) and the Department denies the request the parent, guardian, or custodian has the right to appeal the denial pursuant to 22 M.R.S.A. § 4008(7). In such cases the parent, guardian, or custodian is the appellant.

A. Paper Review:

1. **Time Limit for Appeal:** An appellant must send a written request for a paper review of the denial no later than thirty (30) calendar days after the appellant's receipt of notice that access to the records has been denied. The request must be submitted to the following address:

Substantiation Reviews
Department of Health and Human Services
11 State House Station
Augusta, ME 04333-011

2. **Time Within Which the Department Must Acknowledge Request for Paper Review:** If an appellant requests a paper review the Department shall send a written acknowledgment within fourteen (14) business days.
3. **Time Within Which the Department Must Conduct Paper Review:** The Department shall complete the paper review with ninety (90) calendar days after mailing the acknowledgment described in the foregoing paragraph.
4. **Time Within which the Department Must Notify Appellant of Paper Review Decision:** The Department shall mail written notice of the outcome of the paper review to the appellant within fourteen (14) business days after completing the paper review. If the Department upholds the decision to deny access to the records, he or she must submit a written request for an administrative hearing no more than thirty (30) calendar days after the appellant's receipt of notice that the Department's decision has been upheld after paper review.
5. **Standard of Review:** The standard of review is whether the nondisclosure of the information is necessary to protect any person.

B. Administrative Hearing:

1. **Order of Reference Required:** An Order of Reference shall issue in each case. The Order of Reference shall state the issue for hearing as follows: “Whether, in accordance with 22 M.R.S.A. § 4008, (1) the Department determined that [Appellant] is the parent, legal guardian, custodian, or caretaker of the child; and the nondisclosure of information requested is necessary to protect the child or any other person.”
2. **Separate Hearing Regulations:** The Department’s administrative hearings shall be conducted in accordance with the agency’s “Administrative Hearing Regulations”, 10-144, Chapter 1, found online at <http://www.maine.gov/sos/cec/rules/10/chaps>, subject to the exceptions and supplemental provisions herein.
3. **Exceptions and Supplemental Substantive Rules for Conducting Administrative Hearings:**
 - a) At the hearing, the Department shall bear the burden of persuasion.
 - b) Only adult witnesses may testify.
 - c) The hearing officer may admit and consider oral or written evidence of statements made by any child that are offered by an adult witness. The hearing officer may rely on such evidence to the extent of its probative value. The only exception is statements by a child that were made solely for the purpose of the administrative hearing, such statements are not admissible.
 - d) The Department employee(s) who conducted the paper review may not testify at the hearing.
 - e) After the hearing has been conducted the hearing officer may, at his or her request, examine the records which were the subject of the hearing without the parties present. The hearing officer’s examination of the records may be used to inform his or her decision.
 - f) Privileges are abrogated in administrative hearings in the same manner as child protection court proceedings under 22 M.R.S.A. §4015.
 - g) The Maine Rules of Evidence are not strictly followed in administrative hearings. Generally, evidence shall be admitted if it is relevant and is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. Evidence which is irrelevant or unduly

repetitious may be excluded.